**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**FIRST APPEAL No. 4454 of 2006**
**With**
**CIVIL APPLICATION No. 13012 of 2006**
**In**
**FIRST APPEAL No. 4454 of 2006**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE M.R. SHAH**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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**ANANDKUMAR PREMCHAND JAIN - Appellant(s)**
**Versus**
**SAMATA ENTERPRISE & 1 - Defendant(s)**

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**Appearance :**
MR BHARAT JANI for Appellant(s) : 1,
MS MEGHA JANI for Defendant(s) : 1,
None for Defendant(s) : 2,

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**CORAM : HONOURABLE MR.JUSTICE M.R. SHAH**

**Date : 11/06/2007**

**ORAL JUDGMENT**

1. ***Admit***. Learned Advocates appearing on behalf

the defendants waives service of process of admission on behalf of the defendants.

2. Present First Appeal has been filed by the appellant – original defendant No.2 challenging the judgment and decree dated 08.04.2005 passed by the learned City Civil Judge, City Civil Court, Ahmedabad in Summary Suit No. 4912 of 1998 by which the learned trial Court has passed a decree directing the appellant – herein original defendant No.2 to pay a sum of Rs. 2 lacs to the plaintiff with 18% interest on the said amount from 01.09.1998 till the filing of the suit and rate of interest from the date of suit till the recovery shall be 12% per annum.

3. Respondent No.1 herein – original plaintiff filed Civil Suit No. 4912 of 1998 against the appellant, respondent No.2 herein for recovery of Rs.2,75,000/- with rate of interest at 18% from both the defendants. It was averred in the plaint that the the plaintiff firm had a business transaction with the defendant No.1 through defendant No.2-appellant herein and a sum or Rs.2,76,000/- was due and payable. It was submitted that a letter in the

form of demand notice was served to the respondent No.2 herein and the said amount had not been returned and therefore, a registered notice dated 03.01.1998 had been sent which was replied by defendant No.1 by reply dated 24.02.1998 that vide cheque dated 01.04.1997 a sum of Rs. 2 lacs had already been returned to defendant No.2 – appellant herein. It was averred in the plaint that thereafter, once again notice was served upon defendant No.2 on 20.05.1998 which was not replied. That again notice was given by the plaintiff firm to defendant No.2 on 01.09.1998 but as no reply was given and aforesaid amount was not paid, aforesaid suit came to be filed for recovery of aforesaid amount. Common written statement came to be filed by way of leave to defend vide application Exh. 14 and 15.

4. So far as defendant No.1 is concerned, it was the case on behalf of defendant No.1 that amount of Rs.2 lacs was paid to defendant No.2 by separate cheque in favour of the appellant, therefore, there is no outstanding amount so far as defendant No.1 is concerned.

Defendant No.2 in its reply submitted that he had financed the plaintiff and the total amount outstanding from the plaintiff was Rs.6,90,909/- payable to the defendant No.2. Towards the said outstanding amount dues, a sum of Rs.2,00,000/- had been given by the plaintiff firm to the defendant No.2 and still notice had been falsely given by the plaintiff. Therefore, it was requested to dismiss the suit.

5. The learned trial Court framed the issues at Exh. 48. All the parties i.e. the plaintiff, defendant No.1 and defendant No.2 have given their affidavits in lieu of their examination-in-chief vide Exh. 93, Exh. 107 and Exh. 114 respectively and they were cross-examined by the learned Advocates. Considering the documentary as well as oral evidence, the learned trial Court held that so far as defendant No.1 is concerned, he has already paid an amount of Rs. 2 lacs to defendant No.2. However, from the date amount was due till Rs. 2 lacs was paid by defendant No.1, he has been saddled with liability to pay interest of Rs. 75,000/- and passed decree against defendant No.1 for an amount of Rs. 75,000/-, which

it seems that defendant No.1 has not challenged. So far as defendant No.2 is concerned, the trial Court held on appreciation of evidence that an amount of Rs. 2 lacs payable to the plaintiff was paid by defendant No.1 to defendant No.2 by Cheque. However, defendant No.2 adjusted the said amount of Rs. 2 lacs towards alleged dues of the plaintiff, which was not permissible. Therefore, the learned trial Court passed a decree of Rs. 2 lacs against defendant No.2 along with interest at the rate of 18%. Being aggrieved and dissatisfied with the judgment and decree, the appellant original defendant No.2 has preferred the present First Appeal.

6. Shri B.G.Jani, learned Advocate appearing on behalf of the appellant has vehemently submitted that the learned trial Court has materially erred in accepting the evidence of the plaintiff at Exh. 52 and not appreciating his admission in cross-examination. He has further submitted that the learned trial Court has erred in not appreciating the evidence of defendant No.2 that he has to recovery an amount of Rs. 3,90,000/- from the plaintiff, which according to the appellant, the learned trial Court

ought to have appreciated in a specific query put to the plaintiff as regards Mahavir Finance Corporation having demanded an outstanding amount of Rs. 3,90,000/- from Ganesh Metal Industries to which the plaintiff had admitted in the balance-sheet of 1995-96, was shown as outstanding. He has further submitted that the learned trial Court materially erred in awarding interest of 18% p.a. and requested to reduce the rate of interest from 18% to 12% and/or appropriate rate of interest.

7. On the other hand, Shri Mihir Joshi, learned Senior Advocate appearing on behalf of the original plaintiff has submitted that looking to the conduct of defendant No.2 and considering the evidence on record, documentary as well as oral, the learned trial Court has rightly passed decree of Rs. 2 lacs against the appellant by holding that when defendant No.1 has paid Cheque of Rs. 2 lacs to defendant No.2 to be paid to the original plaintiff, the same was wrongly appropriated by defendant No.2 - appellant herein. He has further submitted that in fact defendant No.2 appellant herein has misused his position as Director of the Bank i.e. Sarangpur

Cooperative Bank and has opened many accounts illegally and has even taken loans by opening illegal accounts and Samata Enterprises was one of such account. Mr. Joshi, learned Senior Advocate submitted that without prejudice to the rights of the original plaintiff in other proceedings and in the present case if the rate of interest is reduced to 12% per annum, then the plaintiff would not have any objection and decree to that extent be modified.

8. Heard the learned Advocates appearing on behalf of the respective parties and gone through the judgment and order passed by the learned trial Court as well as the Record and Proceedings called from the learned trial Court.

9. It is not in dispute that defendant No.1 paid cheque of Rs. 2 lacs payable to original plaintiff to defendant No.2. However, defendant No.2 appropriated the said amount towards alleged dues payable by the plaintiff. It has also come on record that Samata Enterprises was run by the appellant – original defendant No.2. On appreciation of evidence, the learned trial Court has found that the plaintiff

was serving with defendant No.2 and defendant No.2 being Director of the Sarangpur Cooperative Bank has created different finance companies in different names. But in fact he was virtually managing each of them. Three of the companies were finance companies and others were doing different business. The trial Court also found that Samta Enterprises and Ganesh Metal were proprietary firms and the plaintiff was their proprietor as he was made proprietor and as he was working with defendant No.2, as agreed to act as a proprietor. It has also come on record that for one of the companies, defendant No.2 had borrowed loan of Rs. 17 lacs and when the Bank had demanded the said sum of Rs. 17 lacs from his company, he had borrowed money in the name of Samta Enterprises and repaid the loan which made the entire sum outstanding from Samta Enterprises and it is only after Sarangpur Cooperative Bank filed a suit against Samta Enterprises through its proprietor, the present plaintiff realized how he was due resulted into incurring a huge liability financially. It is required to be noted that defendant No.1 did not dispute outstanding amount of Rs. 2 lacs and he paid

the said amount by Cheque to defendant No.2. Defendant No.2 deposited the said cheques towards the outstanding dues of Ganesh Matel Industries to Siddhi Vinayak and the learned trial Court held that the said adjustment cannot be upheld as he was not right in doing so as there was never ever any demand made by way of notice or otherwise. It is required to be noted that initially defendant No.2 denied of having received any amount as alleged by the plaintiff. The learned trial Court further held that merely because the Ganesh Metal and Samta Enterprises were created by defendant No.2 and if it had same proprietor, it does not give any right to defendant No.2 to adjust the dues of Ganesh Metal with that of Samta Enterprises without consent of the plaintiff. As stated above, defendant No.2 denied having received any amount, however, subsequently, defendant No.2 came out with different story of adjusting dues. The learned trial Court held that defendant No.2 cannot be permitted to blow hod and cold simultaneously.

10. Considering evidence on record documentary as well as oral, it cannot be said that the learned trial Court has committed any error in passing the

decree of Rs. 2 lacs against the appellant herein. So far as the rate of interest is concerned, in view of the consensus given by the learned Advocate appearing on behalf of the original plaintiff referred to herein above, without in any way effecting the rights of the original plaintiff in other proceedings, the rate of interest is reduced from 18% per annum to 12% per annum and to that extent the judgment and decree passed by the learned trial Court is modified.

11. For the reasons stated above, the present First Appeal is allowed in part. Judgment and decree passed by the learned trial Court is modified to the extent that instead of 18% interest on Rs. 2 lacs from 01.09.1998 till the filing of the suit, rate of interest would be 12% per annum instead of 18% per annum. Rest of the judgment and decree passed by the learned trial Court is confirmed. This appeal is accordingly allowed to the aforesaid extent. However, there shall be no order as to costs.

12 In view of the disposal of the First Appeal, no order is Civil Application. The Civil Application is also disposed of.

[M.R.Shah, J.]

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